IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5484

BALTIMORE GAS AND ELECTRIC CO., ET AL.,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC. and CONSOLIDATED NATIONAL INTERVENORS, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Baltimore Gas & Electric Company, *et al.*, respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 21, 1976.

OPINION BELOW

The opinion of the Court of Appeals in *Natural Resources Defense Council* v. *Nuclear Regulatory Commission,* No.

74-1586 (D.C. Cir. July 21, 1976) (*App.* 1-44) is not yet officially reported.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTIONS PRESENTED

1. On remanding a regulation for inadequate basis in the record, may a court of appeals create special procedural rights for rulemaking participants which exceed those rights given them by statute, even though these participants failed to show the agency below that special circumstances justified special procedures?

2. On remanding a regulation for inadequate basis in the record, may a court of appeals fail to identify the ills that it wishes cured?

STATUTES AND REGULATIONS INVOLVED

The following statutes and regulation are set forth in the Appendix:

1. Administrative Procedure Act § 4, 5 U.S.C. § 553 (1970) (*App.* 90-91)

[1] This case was decided jointly with No. 74-1385, also styled Natural Resources Defense Council v. Nuclear Regulatory Commission, involving a challenge to the treatment of fuel cycle issues in the operating license proceeding of the Vermont Yankee nuclear power plant. Vermont Yankee Nuclear Power Corporation, Intervenors in No. 74-1385, filed on September 21, 1976 a petition for certiorari which was assigned Supreme Court Docket No. 76-419.

2. Atomic Energy Act of 1954 § 189, 42 U.S.C. § 2239 (1970) (*App.* 92-93)

3. 10 C.F.R. § 51.20(e) (1976) (*App.* 94-95)

STATEMENT OF THE CASE

The uranium fuel for nuclear power plants in the United States is produced, used, and reclaimed in a multistep "fuel cycle" ending with the disposal or management of residual wastes.[2] In November 1972 the Atomic Energy Commission[3] began a rulemaking to collect and summarize information on those environmental effects resulting from each step in the uranium fuel cycle which might be attributable to the annual operation of a nuclear power plant. The rulemaking's conclusions, as crystallized in a so-called Table S-3, were ordered by the Commission to be included thereafter in the environmental statement prepared as part of the agency's review of every proposed nuclear power plant. The Court of Appeals in the decision below upheld most aspects of Table S-3, but set aside the parts of it relating to the reprocessing and waste management steps of the fuel cycle.

[2] The steps in the uranium fuel cycle include mining and milling of uranium ore, its chemical conversion to a usable form, its enrichment in fissionable isotopes of uranium, its fabrication into fuel, its fissioning in a reactor to produce power, reprocessing of spent fuel, disposal or management of radioactive waste, and associated transportation links. Of these steps only fissioning of fuel and temporary storage of spent fuel and waste take place at nuclear power plants. The other activities in the fuel cycle occur elsewhere and are subject to licensing requirements distinct from those governing nuclear power plants.

[3] The Atomic Energy Commission (AEC) was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (Supp. V, 1975), which also created the Nuclear Regulatory Commission (NRC) and transfered to it the AEC's licensing and regulatory functions, 42 U.S.C. §§ 5814(a), 5841(a),(f), 5871. Hereinafter, "Commission" applies to both the AEC and the NRC.

A. Administrative Proceedings

The Commission commenced its rulemaking on the Environmental Effects of the Uranium Fuel Cycle with a *Federal Register* notice published on November 15, 1972. 37 Fed. Reg. 24191, *App.* 62. The notice proposed amendments to the agency's environmental review regulations and announced the availability of a report underlying the proposed rule. The report, compiled by the Commission's Regulatory Staff, was entitled *Environmental Survey of the Nuclear Fuel Cycle* (November 1972) [hereinafter cited as "Environmental Survey"]. The Environmental Survey described the annual fuel cycle effects attributable to a typical nuclear power plant and presented the methodology and assumptions used by the Regulatory Staff in arriving at its conclusions. The Notice also published Table S-3, the Environmental Survey's tabular summation of its findings. The Commission solicited public comment on the Environmental Survey and Table S-3 and stated that it would subsequently consider the matter in a legislative-type hearing.

On January 3, 1973, the Commission set the rulemaking in motion, establishing a three-member Hearing Board and providing that participants could make oral statements as well as written submissions. 38 Fed. Reg. 49, *App.* 71.

Several weeks prior to the hearings, the Commission made available in its Public Document Room the background studies for the Environmental Survey, internal Regulatory Staff calculations for it, and other supporting materials as well as prior drafts of the report as marked up by the Regulatory Staff. 39 Fed. Reg. 14188, 14190-91 (1974), *App.* 85-86. Only one party to the rulemaking asked for additional documents and that request was promptly honored. *See* 39 Fed. Reg. 14189 n.2 (1974), *App.* 79 n.2.

All interested persons had an opportunity to become parties to the rulemaking. 37 Fed. Reg. 24193 (1972), *App.* 69; 38 Fed. Reg. 50 (1973), *App.* 72. A Procedure Planning Session was held on January 17, 1973 to schedule the appearance of witnesses and to define further the rulemaking's procedures. The Hearing Board indicated that it would question the Regulatory Staff and other participants. Transcript 4, 5 [hereinafter cited as "Tr."]; *see* 38 Fed. Reg. 50 (1973), *App.* 72. The Hearing Board also asked that the participants bring with them to the hearings expert witnesses able to answer technical questions, so as to aid the Board's development of a complete, informative record for the Commission. Tr. 20. All participants were allowed to submit pre- and post-hearing written material, including rebuttal to the written and oral statements made by the Regulatory Staff and other participants.

At the hearings, held February 1-2, 1973, respondent Natural Resources Defense Council (NRDC) was represented by respondent Consolidated National Intervenors (CNI). Testimony was presented by the Staff, respondents, and nine other participants including petitioners. Written comments were received from 46 individuals and groups. No testimony was excluded or limited for irrelevancy, duplication, or any other reason. Throughout the proceeding, the Board voiced its desire for a complete record and encouraged the participants—particularly CNI—to submit their views fully. *E.g.*, Tr. 20, 43, 338-40, 395, 452-53, 517-18.

Respondent CNI, at the Procedure Planning Session, did not make any request that the rulemaking employ adversarial procedures beyond those set forth in the Notice of Hearing. At the hearings themselves, however, CNI suggested that the Commission "convene a full generic hearing on the question of the nuclear fuel cycle, which is subject to

full adjudicatory rights," including discovery and cross-examination on all issues. Tr. 217-18. CNI further contended that, as a matter of law, the proposed rule must "at some stage in the procedure be subjected to the full adjudicatory rights under the Administrative Procedure Act." Tr. 338.

In response, petitioners and other participants stated that, in order to establish any right to such special procedures, respondents first had a duty to specify questions of substantial importance that could not be resolved by existing procedures.[4] Respondents, while expressing general misgivings on various technical issues,[5] never attempted to make such a showing.[6]

[4] *E.g.*, Tr. 52, 436-38, 444, 468-71, 475-76, 478-80; Reply of 14-Member Utility Group to CNI-UCS "Statement with Respect to Legal Considerations" of March 2, 1973, at 8-13 (March 16, 1973).

[5] Respondents' technical presentations took two forms: the oral testimony at the hearings of Drs. Edward P. Radford, Jr. and Henry W. Kendall, and the submission on March 19, 1973 of written "Supplementary Comments." Dr. Radford made general comments and responded to questions from the Board on occupational radiological exposure in mines, at power plants and at reprocessing facilities. Tr. 219-63. Dr. Kendall spoke generally to and was questioned on catastrophic accidents at power plants, the diversion of fissionable material for illegal purposes, and the management of radioactive wastes. Tr. 263-304. The "Supplementary Comments" outlined certain high-level waste storage techniques and addressed the radiological effects of a fuel reprocessing plant in New York which ceased operation in 1971.

[6] Respondents' only tangible attempt to show the need for cross-examination is found at page 26 of their "Statement with Respect to Legal Considerations," filed with the Board on March 2, 1973. There, two brief portions of hearing dialogue were cited as evidence that "pervasive cross-examination" is a prerequisite to building an adequate record. Both colloquies involved questions put by Board members to the Regulatory Staff which, respondents contended, were not completely answered. The first concerned standards applied by the Bureau of Mines and state governments, matters extraneous to the rulemaking. Tr. 308-12. The second related to calculations in the Environmental Survey. One Board member, Dr. John C. Geyer, had requested data underlying certain statements made in the Environmental Survey (Tr. 121-28); the Regulatory Staff witness' inability fully to respond prompted another Board member, Dr. M. J. Steindler, to comment later that there might well have been no need for Dr. Geyer's questions had these portions of the Survey been more fully documented. Tr. 139. In the "Statement with Respect to Legal Considerations," respondents asserted that cross-examination was necessary to obtain the data sought by Dr. Geyer. In fact, these data were fully supplied by the Regulatory Staff in its post-hearing "Supplementary Comments." Since respondents never commented substantively on this issue, refusing to avail themselves of the Hearing Board's direction to use supplementary comments "to highlight and point up the problems, and the questions . . . raised in the written and oral presentations of the other participants" (Tr. 6), and since respondents did not comment on the data supplied in the Regulatory Staff's "Supplementary Comments" (as petitioners and other participants did on respondents' "Supplementary Comments"), the episode stands not as a brief for cross-examination but rather as a paradigm both of the adequacy of the agency's procedures and of respondents' failure even to attempt to use them.

After reviewing the fuel cycle rulemaking record and other related data available to it, the Commission revised the Environmental Survey,[7] including Table S-3, and issued its Uranium Fuel Cycle Rule, which required that the values set forth in revised Table S-3 be factored into the cost-benefit analyses for all proposed nuclear power plants after June 6, 1974. 39 Fed. Reg. 14188 (1974), *App.* 74.[8] Following issuance of the final rule, respondents, NRDC and CNI, petitioned for its review in the U.S. Court of Appeals for the District of Columbia Circuit.

B. The Opinion of the Court of Appeals

On July 21, 1976, the Court of Appeals, in an opinion by Chief Judge Bazelon with Judge Tamm concurring in the result, held that the waste disposal and reprocessing portions of the rulemaking record did not contain sufficient "explana-

[7] Environmental Survey of the Uranium Fuel Cycle (WASH-1248), April 1974.

[8] The Uranium Fuel Cycle Rule has been codified at 10 C.F.R. § 51.20(e) (1976), *App.* 94-95.

tion and support" for the Staff's conclusions in the Environmental Survey. *App.* 24-25. The court indicated in some detail why it believed that there was "an insufficient record to sustain the . . . numerical values in Table S-3" relating to nuclear waste disposal. *App.* 25-39. The court, however, never explained why it thought the considerable record on reprocessing (*see* note 14 *infra* and accompanying text) was deficient. The majority's entire treatment of the matter consists of three repetitions of the term "reprocessing" (*App.* 24-25, 40-41, 44), with absolutely no discussion, much less analysis, of the relevant record or of any weaknesses perceived in it.

So far as rulemaking procedures were concerned, the majority observed that respondents' "primary argument" below was that the Commission's decision to preclude " 'discovery or cross-examination' denied them . . . due process." *App.* 16. Later the majority somewhat inconsistently concluded that, "as we understand it, [respondents' argument] is not that cross-examination was required *per se,* but that the procedures utilized by the Commission were in the aggregate inadequate sufficiently to ventilate the issues." *App.* 18 n.25.

Relying on this latter characterization of respondents' procedural challenge, the majority found it necessary to determine "whether the procedures provided by the agency were sufficient to ventilate the issues." *App.* 17. Since the majority believed that assessment of "agency procedures requires that the reviewing court immerse itself in the record," *App.* 20, it resolved the procedural challenge only after first finding deficiencies in the record. *App.* 38. At that point, the majority ordered "procedural devices" on remand in excess of the notice and comment requirements of the Atomic Energy Act and the Administrative Procedure Act. *App.* 40-41; see note 10 *infra.* The court stated that perhaps a

"more sensitive, deliberate" application of procedures used in the original rulemaking proceeding would suffice (*App.* 40); or perhaps a special combination of adversarial procedures described by the majority might be necessary to produce proper "ventilation." *Id.* But the majority also concluded that possibly "no combination of the procedures mentioned above will prove adequate, and the agency will be required to develop new procedures . . . ." *Id.*[9]

Judge Tamm found no merit in the majority's conclusions regarding rulemaking procedures. *App.* 52-59.

REASONS FOR GRANTING THE WRIT

Petitioners come to this Court because the decision below threatens to disrupt agency rulemaking, both by confusing its procedures and by vacating its results without explaining why. Such obstruction of the regulatory process is particularly telling when it comes, as here, from the Court of Appeals for the District of Columbia Circuit—a court which is uniquely positioned to shape agency practice in this country. Thus, the opinion below may affect the future rulemakings of all federal administrative agencies.

I. Special Procedures Demand Special Circumstances

Having found the rulemaking record deficient, the court below held that the Commission could cure those deficiencies *only* through use of special adversarial procedures in excess of the rulemaking rights provided by the Atomic Energy

[9] In response to an NRC motion to correct the opinion, the court re-immersed itself in the rulemaking record and, per curiam, deleted on October 8 each of the majority opinion's three emphatic but erroneous assertions that the Hearing Board, in its failure to ensure a fully "ventilated" record, had not conducted any examination of the NRC Staff's expert witness on waste management, Dr. Frank Pittman. *App.* 60-61, *correcting App.* 34 (lines 3-5), 34 n.53, 41 n.59.

Act and the Administrative Procedure Act (APA).[10] *App.* 40-41. Moreover, having entered the procedural realm, the court declined to specify *which* combination of special procedures would suffice, thus heightening the hobbling effect of its intervention. Such judicial "oversight" of agency rulemaking has no place in law or policy.

In recent years, agencies have increasingly turned to rulemaking to resolve complex factual as well as policy issues. In recognition of the complexity of the issues before them, agencies have found a need for greater involvement in rulemaking by participants who may be able to assist in the optimum resolution of pending questions. The Nuclear Regulatory Commission has been among those agencies which on occasion have adopted procedures beyond those required by their organic statutes and the APA so as to foster unusually well developed records.

Until the disruptive decision below, there has been relatively little need for this Court to involve itself with the mechanics of such complex rulemaking. Prior decisions here have focused on the more traditional rulemaking situations and, thus, on the procedures required by an agency's organic statute or the APA. *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). These cases have also

[10] Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a) (1970) (App. 92-93) provides that the Commission shall, in rulemaking, grant a "hearing" upon the request of any person whose interest may be affected. In *Siegel* v. *AEC*, 400 F.2d 778 (D.C. Cir. 1968), the court held that a rulemaking "hearing" in the context of this statute requires only the notice and comment procedures set out in § 4 of the APA, 5 U.S.C. § 553 (Supp. V, 1975) (App. 90-91). This interpretation is consistent with this Court's later holding in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972), that full adjudicatory rights obtain in rulemaking only when the organic statute contains the talismanic phrase "on the record."

recognized that, when an agency is called upon to make a "quasi-judicial" determination in rulemaking, additional procedures may be required by "due process" considerations. *Florida East Coast Ry.*, 410 U.S. at 242-45.

The courts of appeal have focused more explicitly on the mechanics of fact-policy rulemaking, in which no bright line separates "quasi-legislative" and "quasi-judicial" determinations. Their decisions have indicated that a rulemaking participant may, in certain situations, challenge procedures which satisfy statutory requirements but which nonetheless deny due process or are inadequate to develop a complete record. *E.g., International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615 (D.C. Cir. 1973); *American Airlines, Inc.* v. *CAB,* 359 F.2d 624 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 843 (1966).

These decisions have made clear, however, that in order to sustain a "due process" or "record" challenge to agency procedures, the petitioner *during the rulemaking* must make "circumscribed and justified requests" for additional procedures and his request must demonstrate that on "critical points . . . the general procedure . . . [is] inadequate to probe 'soft' and sensitive subjects." *International Harvester,* 478 F.2d at 631. In other words, the courts have not entertained demands for special rulemaking procedures unless the petitioner has previously made to the agency a showing that its reliance on minimum statutory procedures alone would be fundamentally unfair, or that the agency would abuse its discretion by denying certain special procedures likely to improve significantly the quality of a critical portion of the record.

In this case, as detailed above, the NRC used rulemaking procedures which went beyond those required under the Atomic Energy Act or APA. Respondents alleged below

that these procedures were flawed because the Comission had not provided across-the-board rights to formal discovery and cross-examination.[11] But respondents persistently refused even to attempt to show specifically why the existing procedures were unfair or why cross-examination or any other special adversarial procedure would significantly improve the record. Rather, as the Commission stated when it promulgated the Uranium Fuel Cycle Rule:

> All parties were fully heard. Nothing offered was excluded. The record does not indicate that any evidentiary material would have been received under different procedures. Nor did the proponent of the strict "adjudicatory" approach make an offer of proof—or even remotely suggest—what substantive matters it would develop under differen[t] procedures.

39 Fed. Reg. 14189 (1974), *App.* 78.

The Court of Appeals attempted to avoid these findings by deeming the *International Harvester* test for demonstrating the need for special procedures (478 F.2d at 631) to have been met. *App.* 17-18 n.25. It was not. The statement by counsel for respondents at the oral hearing, relied upon by the court, merely recited their demand for a broad right to cross-examination and commented generally on the testimony of Dr. Frank Pittman, the Regulatory Staff's witness on waste disposal matters, as follows:

> we are not satisfied with Mr. Pittman's well intentioned, but, we think, not at all well explained position with regard to the ability to handle nuclear wastes for hundreds of thousands of years . . . .

App. 17; Tr. 208.

[11] The Court transmuted respondents' sweeping demands for cross-examination and discovery to the more diffuse allegation "that the procedures utilized by the Commission were in the aggregate inadequate . . . ." *App.* 18 n.25. See p. 8 *supra.*

Respondents, however, made no attempt at the hearing to identify specific waste disposal issues which, in their view, required cross-examination for adequate exploration. Moreover, although respondents' rulemaking submissions identified two "examples" of subjects which, they asserted, did require cross-examination (see note 6 *supra*), these submissions evinced no concrete effort to identify and develop whatever inadequacies respondents may have thought to exist in Dr. Pittman's testimony. Nor did respondents attempt to show *how* the resolution of any specific factual issues of critical importance would be dependent upon the use of one special procedure or another.[12]

To the contrary, as the court recognized, respondents' principal concerns involved "philosophical issues," not factual issues." *App.* 36. While additional adversarial opportunities may be required to resolve complex factual matters, no court has even intimated that such procedures are required to resolve "philosophical issues." In short, respondents showed no special circumstances to justify special procedures.

Contrary to law and common sense, then, the court below would relieve a dissatisfied rulemaking participant of his obligation to attempt to develop an adequate record using the procedures established by the agency which, at a minimum, satisfy the requirements of applicable statutes. Similarly, under the decision below a rulemaking participant unhappy with an agency's procedures has no obligation to demonstrate that these procedures are *per se* unfair or are inadequate with respect to specific issues. Rather, under the present decision a disgruntled rulemaking participant may

[12] The court itself recognized that, with respect to their principal procedural demand, respondents "did not show that . . . issues could not be explored except through cross-examination; nor did they attempt such a showing . . . ." *App.* 18 n.25.

spurn procedural opportunities to make his case below whenever those rights are not shaped precisely in his image. He may systematically decline to specify how other opportunities would enhance critical aspects of the record and then, after the final rule is issued, come to the Court of Appeals to find procedural succor.

The present holding is not conducive to the integrity of the administrative process. It encourages malingering during record-making by rulemaking participants whose procedural demands are not wholly met. It eliminates reasonable certainty as to what constitutes acceptable rulemaking procedures. And it leaves rulemaking results in limbo, pending inquest by the Court of Appeals into whether the agency has been sufficiently "sensitive" (*App.* 40) in its procedural arrangements.

It follows that the decision below contravenes the holdings of this and other federal courts which recognize that, in reviewing the *adequacy* of a record, the court's function is to determine whether the agency has adequately set out the basis for its action. If it has not, the court can remand to the agency to supply the missing information. In remanding, however, the court cannot, absent "substantial justification for doing otherwise," dictate "the methods, procedures and time dimension" for remedying the record.[13] *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976) (per curiam).

[13] The court in *International Harvester* apparently found such "substantial justification" since it rejected petitioners' procedural challenges but still ordered the agency to provide, on remand, a limited opportunity for cross-examination. 478 F.2d at 649. There, however, the rulemaking participants and others, through their submittals, had developed a detailed record which challenged the agency's conclusions and left the court "uncertain" whether the agency had correctly resolved several complex technical issues which were critical to achieving the substantive result intended by Congress. *Id.* Both the state of the record and the nature of respondents' participation in the rulemaking below clearly distinguish this case from *International Harvester*. The circumstances here are similar to those in *South Terminal Corp.* v. *EPA*, 504 F.2d 646 (1st Cir. 1974). There, the court found the agency record inadequate and remanded for further proceedings even though the petitioners, in that case, like respondents here, had done little or nothing to cure the record's inadequacies. *Id.* at 665-66. On remand, the court required only that the agency's proceedings satisfy the minimum requirements of its organic statute and § 4 of the APA. *Id.* at 666-67.

II. Remands Require Reasons

The present rulemaking record contains extensive testimony, comments and other information on the subject of the environmental effects of reprocessing.[14] Nowhere in the decision below does the court explain the basis for its conclusion that the reprocessing record is inadequate—or even identify a single deficiency in that part of the record. It is ironic that, given the court's repeated emphasis on the need for agencies to articulate adequately the bases for their actions (*App.* 23-24, 34-35, 38-39), it fails to provide any articulation of its own for this critical holding.

Fairness to the parties below who may wish to request review by this Court demands more. By not explaining the grounds for *its* decision, the Court of Appeals places such

[14] See, *e.g.*, Environmental Survey F-1 to -41; WASH-1248, note 7 *supra*, F-1 to -40; Tr. 84-86, 130-38, 244-50, 312-20, 412-15, 484-85; General Electric Company, Comments on the Supplementary Comments by the Union of Concerned Scientists 1-2 (undated); State of New York, Comments on the Environmental Survey 3-8 (January 18, 1973); General Electric Company, Supplemental Written Statement 5-7 (March 1, 1973); Staff Summary Comments on Proceeding for Environmental Effects of the Uranium Fuel Cycle 43-52 (March 19, 1973); CNI-UCS Supplementary Comments 3.1-3.50 (March 19, 1973); New York State Atomic Energy Council Comments on the Supplementary Comments by the Union of Concerned Scientists 1-6 (April 13, 1973); Response of 14-Member Utility Group to "Supplementary Comments" of CNI-UCS 6-21 (April 13, 1973); Nuclear Fuel Services, Inc. Response to Union of Concerned Scientists 1-7 (April 16, 1973).

parties in the position of asking this Court to do something manifestly inappropriate in light of the demands on its time: conduct a *de novo* review of a large rulemaking record to determine whether the Court of Appeals was correct in holding the record inadequate as to reprocessing. Even more important, the Court of Appeals as a reviewing court has failed to fulfill its responsibility to the agency. A blanket remand without any articulation will lead to unnecessary delay in completing the rulemaking. Not only will the agency be unable to narrow its attention to particular areas of concern but, if the agency guesses wrong, the court may remand the rule again to correct a deficiency it could have easily identified at the outset. This Court should make clear that a reviewing court has the obligation to articulate the grounds for its decisions so that those affected by them will be able to respond in an expeditious and efficient manner.[15]

III. The Decision Below Has Pervasive Impact

As noted already, obstruction of the regulatory process is particularly telling when it comes at the hands of the Court of Appeals for the District of Columbia Circuit. This court has a far greater influence on the evolution of administrative law in this country than does any other judicial circuit.

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[15] The fact that an agency, on remand, must follow the dictates of its reviewing court, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *Mefford* v. *Gardner*, 383 F.2d 748, 758 (6th Cir. 1967), carries with it the necessary implication that reviewing courts must be specific in their directions to an agency. Courts have consistently met this responsibility by clearly delineating those areas of the record in which further information or explanation is needed. *E.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 388, 394, 398, 399 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 850 (D.C. Cir. 1972); EDF v. Ruckelshaus, 439 F.2d 584, 596 (D.C. Cir. 1971); Carnevale v. Gardner, 393 F.2d 889, 891 (2d Cir. 1968); Western Air Lines, Inc. v. CAB, 351 F.2d 778, 783-84 (D.C. Cir. 1965).

Venue lies in the United States District Court for the District of Columbia Circuit to review, under the APA, virtually every final agency order not otherwise reviewable by statute.[16] That Circuit Court has exclusive jurisdiction to review a number of administrative actions of the Environmental Protection Agency and the Federal Energy Administration.[17] Final orders of the Nuclear Regulatory Commission, Federal Communications Commission, Federal Maritime Commission, and the Federal Power Commission are subject to review in the District of Columbia Circuit, regardless of the residence of the petitioner.[18]

Thus, given the reality that the orders of virtually every federal agency are subject to challenge in the District of Columbia Circuit, each agency must heed the implications of *every* major decision by that Circuit governing agency practice. The present decision displays all the indicia of being such a major pronouncement, one whose implications are ominous for all agencies, not merely the Nuclear Regulatory Commission.

If the decision below stands, agencies will be encouraged to curtail informal rulemaking under the APA in favor of protracted adversarial proceedings, lest their rulemaking results be summarily reversed for lack of "sensitivity" to the procedural demands of participants who failed, or

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[16] 28 U.S.C. § 1391(e) (1970).

[17] 42 U.S.C. § 1857h-5(b)(1) (1970), 42 U.S.C. § 4915(a) (Supp. V, 1975) (Environmental Protection Agency); 15 U.S.C. § 766(i)(2)(A) (Supp. V, 1975) (Federal Energy Administration).

[18] 28 U.S.C. §§ 2342(4), 2343 (1970) (NRC); 28 U.S.C. §§ 2342(1), 2343 (1970) (Federal Communications Commission); 28 U.S.C. §§ 2342(3), 2343 (1970) (Federal Maritime Commission); 16 U.S.C. § 825*l*(b) (1970) (Federal Power Commission).

simply refused, to demonstrate to the agency any need for additional procedures. Such a result would not serve the public interest.[19]

By the same token, the integrity of the administrative process cannot long survive a willingness on the part of the District of Columbia Circuit to remand agency rules without explaining why. Inarticulate remands, like rules without adequate records, will lessen the efficiency of government and public confidence in it.

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[19]Inhibition of agency flexibility in rulemaking would strip that type of proceeding of much of its utility:

> Rule making has a unique value and importance as an administrative technique for evolution of general policy, notwithstanding, or perhaps indeed because of, the freedom from the procedures carefully prescribed to assure fairness in individual adjudication.

American Airlines, 359 F.2d at 630 (footnote and citation omitted).

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

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